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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10 WESTERN DIVISION

11 ALFRED AHMED CAREW, } Case No. CV 17-01417-DFM  
12 Plaintiff, }  
13 v. } MEMORANDUM OPINION AND  
14 NANCY A. BERRYHILL, Acting } ORDER  
15 Commissioner of Social Security, }  
16 Defendant. }

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18 Alfred Ahmed Carew (“Plaintiff”) appeals from the Social Security  
19 Commissioner’s final decision denying his application for Disability Insurance  
20 Benefits (“DIB”). For the reasons discussed below, the Commissioner’s  
21 decision is reversed and this matter is remanded for further proceedings.

22 **I.**

23 **BACKGROUND**

24 Plaintiff filed an application for DIB alleging disability beginning on  
25 February 11, 2013. See Administrative Record (“AR”) 23, 170-71. After  
26 Plaintiff’s claim was denied, he requested a hearing before an administrative  
27 law judge (“ALJ”). See AR 72-73.

28 On April 29, 2015, at a hearing at which Plaintiff appeared with counsel,

1 the ALJ heard testimony from Plaintiff, a medical expert, and a vocational  
2 expert. See AR 37-53.

3 On May 12, 2015, the ALJ issued a written decision denying Plaintiff's  
4 claim for benefits after applying the five-step sequential evaluation. See AR 23-  
5 31. First, Plaintiff had not engaged in substantial gainful activity since the  
6 alleged onset date. See AR 25. Second, Plaintiff had severe impairments  
7 consisting of carpal tunnel syndrome, osteoarthritis, degenerative disc disease,  
8 and plantar fasciitis. See id. Third, Plaintiff did not have an impairment or  
9 combination of impairments that met or equaled the requirements of a listed  
10 impairment. See AR 26. Fourth, based on Plaintiff's residual functional  
11 capacity for a reduced level of light work, he could return to his past relevant  
12 work as a deli assistant manager. See AR 26, 29. Fifth, in the alternative,  
13 Plaintiff could perform other jobs existing in significant numbers in the  
14 national economy: case aide and information clerk. See AR 30-31.  
15 Accordingly, the ALJ concluded that Plaintiff was not disabled. See AR 31.

16 On December 20, 2016, the Appeals Council denied review of the ALJ's  
17 decision, which became the final decision of the Commissioner. See AR 1-5.  
18 Plaintiff sought judicial review in this Court. See Dkt. 1.

## 19 II.

### 20 DISCUSSION

21 The parties dispute whether the ALJ properly considered Plaintiff's  
22 testimony. See Joint Submission (Dkt. 17) ("JS") at 4.

#### 23 A. Applicable Law

24 The court engages in a two-step analysis to review the ALJ's evaluation  
25 of Plaintiff's symptom testimony. See Trevizo v. Berryhill, 871 F.3d 664, 678  
26 (9th Cir. 2017). First, the ALJ must determine whether the claimant has  
27 presented objective medical evidence of an underlying impairment that could  
28 reasonably be expected to produce the symptoms alleged. See id. If the

1 claimant satisfies this first step, and there is no evidence of malingering, the  
2 ALJ can reject the claimant's testimony about the severity of symptoms only  
3 by offering specific, clear and convincing reasons for doing so. See id.

4 **B. Analysis**

5 During the hearing, Plaintiff testified as follows about his alleged  
6 impairments and symptoms. He stopped working in 2013, when he fell at his  
7 job at a deli. See AR 41. He cannot work because of problems with his wrist,  
8 back, and foot. See AR 42. He does not drive but uses Access, a paratransit  
9 service for the disabled, for transportation. See AR 43; see also AR 308. A  
10 typical day for him involves reading or going to church with his mother. See  
11 AR 44. He can walk for "at least one block" but has problems with standing  
12 because of his right leg. See AR 45. He uses a cane, but it was not prescribed  
13 by a doctor. See id. He is right-handed, and his carpal tunnel syndrome in that  
14 hand prevents him from typing. See AR 45-46. He does not drink alcohol but  
15 occasionally uses medical marijuana. See AR 52.

16 The ALJ found that Plaintiff had underlying impairments that would  
17 have "considerable exertional, postural, manipulative, and environmental  
18 limitations." AR 28. Nonetheless, the ALJ rejected Plaintiff's subjective  
19 symptom testimony with a two-paragraph explanation. See AR 28-29. The two  
20 paragraphs had a single subject: Plaintiff's testimony was inconsistent with the  
21 medical record. See id.

22 Where, as in this case, "the claimant produces objective medical  
23 evidence of an underlying impairment, an adjudicator may not reject a  
24 claimant's subjective complaints based solely on a lack of objective medical  
25 evidence to fully corroborate the alleged severity of pain." Bunnell v. Sullivan,  
26 947 F.2d 341, 345 (9th Cir. 1991) (en banc) (citing Cotton v. Bowen, 799 F.2d  
27 1403, 1407 (9th Cir. 1986)); see also Robbins v. Soc. Sec. Admin., 466 F.3d  
28 880, 883 (9th Cir. 2006) ("While an ALJ may find testimony not credible in

1 part or in whole, he or she may not disregard it solely because it is not  
2 substantiated affirmatively by objective medical evidence.”). Because the ALJ  
3 rejected Plaintiff’s testimony solely for lack of objective medical support, that  
4 determination was legally erroneous. See Moisa v. Barnhart, 367 F.3d 882, 885  
5 (9th Cir. 2004) (“[T]he ALJ rejected Moisa’s pain testimony solely for lack of  
6 objective medical evidence corroborating it. . . . His rejection of Moisa’s pain  
7 testimony was therefore clear error.”).

8 The Commissioner contends that the ALJ relied on other reasons—  
9 Plaintiff’s conservative treatment and inconsistent statements—to reject  
10 Plaintiff’s testimony on legally adequate grounds. See JS at 11, 14. But the  
11 ALJ did not actually articulate these other reasons to reject Plaintiff’s  
12 testimony, so the Court cannot consider them. See Connett v. Barnhart, 340  
13 F.3d 871, 874 (9th Cir. 2003) (“We are constrained to review the reasons the  
14 ALJ asserts.”); Ceguerra v. Sec’y of Health and Human Servs., 933 F.2d 735,  
15 738 (9th Cir. 1991) (“A reviewing court can evaluate an agency’s decision only  
16 on the grounds articulated by the agency.”). In particular, the Court cannot  
17 link the ALJ’s comments elsewhere in the decision about the evidence to the  
18 ALJ’s rejection of Plaintiff’s testimony, because the ALJ did not articulate that  
19 link in the first instance. See Brown-Hunter v. Colvin, 806 F.3d 487, 494 (9th  
20 Cir. 2015) (“[The ALJ] did not link that testimony to the particular parts of the  
21 record supporting her non-credibility determination. . . . [T]he error could not  
22 be corrected by the district court’s statement of links between claimant  
23 testimony and certain medical evidence.”) (citing Burrell v. Colvin, 775 F.3d  
24 1133, 1138 (9th Cir. 2014)).

25 In any event, the sole reason articulated by the ALJ to reject Plaintiff’s  
26 testimony, for lack of supporting objective medical evidence, did not reflect an  
27 accurate view of the record as a whole. See Ghanim v. Colvin, 763 F.3d 1154,  
28 1164 (9th Cir. 2014) (“[T]he treatment records must be viewed in light of the

1 overall diagnostic record.”) (citations omitted). For example, the ALJ found  
2 that “there is no indication that [Plaintiff’s] cane has been prescribed or was  
3 mentioned in any of his progress notes.” AR 28. This does not account for the  
4 fact that Plaintiff openly acknowledged at the hearing that his cane was not  
5 medically prescribed. See AR 45. Given Plaintiff’s candor on this point, it  
6 provided no basis for the apparent inference that he was being dishonest about  
7 the source of the cane.

8       The ALJ also found that the medical record showed Plaintiff’s “objective  
9 clinical presentation remains mostly normal.” AR 28. This finding is called  
10 into question by evidence that Plaintiff presented for the first time to the  
11 Appeals Council. See Brewes v. Comm’r of Soc. Sec. Admin., 682 F.3d 1157,  
12 1163 (9th Cir. 2012) (evidence presented for the first time to the Appeals  
13 Council becomes part of the administrative record, which the district court  
14 must consider when reviewing the Commissioner’s final decision for  
15 substantial evidence). According to that evidence, Plaintiff has a “moderate  
16 pathological sleep breathing respiratory disorder,” possibly has mild  
17 autonomic dysfunction, and was repeatedly treated for lumbar radiculopathy,  
18 lumbar disc protrusion, right wrist/hand internal derangement, and right  
19 ankle/foot osteoarthritis. AR 499, 509, 531-50. Thus, the reason actually  
20 articulated by the ALJ for rejecting Plaintiff’s subjective symptom testimony  
21 would not have been supported by substantial evidence.

22       Finally, the error was not harmless. The Commissioner’s failure to state  
23 legally adequate reasons for rejecting a claimant’s subjective symptom  
24 testimony is harmless “only if it is inconsequential to the ultimate nondisability  
25 determination.” Brown-Hunter, 806 F.3d at 494 (citation omitted). A district  
26 court may not find the error harmless by supplying supporting reasons from its  
27 own review of the record. See id. at 492 (“A reviewing court may not make  
28 independent findings based on the evidence before the ALJ to conclude that

1 the ALJ's error was harmless."'). Because the only reason articulated by the  
2 Commissioner in this case was legally insufficient, the "agency's path cannot  
3 reasonably be discerned," and reversal is warranted. Id. at 495 (citation  
4 omitted).

5 **C. Remand for Further Proceedings**

6 The decision whether to remand for further proceedings is within this  
7 Court's discretion. See Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir.  
8 2000) (as amended). Where no useful purpose would be served by further  
9 administrative proceedings, or where the record has been fully developed, it is  
10 appropriate to exercise this discretion to direct an immediate award of benefits.  
11 See id. at 1179 (noting that "the decision of whether to remand for further  
12 proceedings turns upon the likely utility of such proceedings"); Benecke v.  
13 Barnhart, 379 F.3d 587, 593 (9th Cir. 2004).

14 A remand is appropriate, however, where there are outstanding issues  
15 that must be resolved before a determination of disability can be made and it is  
16 not clear from the record that the ALJ would be required to find the claimant  
17 disabled if all the evidence were properly evaluated. See Bunnell v. Barnhart,  
18 336 F.3d 1112, 1115-16 (9th Cir. 2003); see also Garrison v. Colvin, 759 F.3d  
19 995, 1021 (9th Cir. 2014) (explaining that courts have "flexibility to remand for  
20 further proceedings when the record as a whole creates serious doubt as to  
21 whether the claimant is, in fact, disabled within the meaning of the Social  
22 Security Act.'). Here, remand for further proceedings would serve a useful  
23 purpose because outstanding issues remain from the conflicting evidence about  
24 whether Plaintiff is disabled. See Brown-Hunter, 806 F.3d at 495-96 (despite  
25 the ALJ's failure to articulate reasons for finding a claimant's testimony not  
26 credible, a reviewing court has discretion to remand for further proceedings  
27 when the record raises doubts about disability) (citing Treichler v. Comm'r of  
28 Soc. Sec. Admin., 775 F.3d 1090, 1101 (9th Cir. 2014) ("Where there is

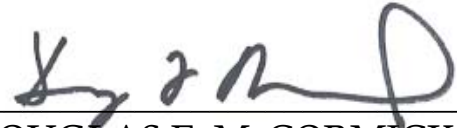
1 conflicting evidence, and not all essential factual issues have been resolved, a  
2 remand for an award of benefits is inappropriate.”)). Thus, this action is  
3 remanded for further proceedings.

4 **III.**

5 **CONCLUSION**

6 For the reasons stated above, the decision of the Social Security  
7 Commissioner is REVERSED and the action is REMANDED for further  
8 proceedings.

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10 Dated: March 22, 2018

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14 DOUGLAS F. McCORMICK  
15 United States Magistrate Judge  
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